



U.S. Citizenship
and Immigration
Services

FILE:

Office: VERMONT SERVICE CENTER

Date: OCT 13 2004

IN RE:

Petitioner:

Beneficiary:

PETITION: Immigrant Petition for Special Immigrant Religious Worker Pursuant to Section 203(b)(4) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(4), as described at Section 101(a)(27)(C) of the Act, 8 U.S.C. § 1101(a)(27)(C)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Mari Johnson

Robert P. Wiemann, Director
Administrative Appeals Office

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DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a Developmental Disabilities Service Office (DDSO) operated by the New York State Office of Mental Retardation and Developmental Disabilities (OMRDD). It seeks to classify the beneficiary¹ as a special immigrant religious worker pursuant to section 203(b)(4) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(4), to perform services as a Catholic chaplain at the petitioning DDSO and at Bernard Fineson DDSO. The director determined that the petitioner had not established (1) that the beneficiary had the requisite two years of continuous work experience in a qualifying religious occupation immediately preceding the filing date of the petition; (2) that the position offered to the beneficiary qualifies as a religious occupation; or (3) its qualifying status as a tax-exempt religious organization.

Section 203(b)(4) of the Act provides classification to qualified special immigrant religious workers as described in section 101(a)(27)(C) of the Act, 8 U.S.C. § 1101(a)(27)(C), which pertains to an immigrant who:

(i) for at least 2 years immediately preceding the time of application for admission, has been a member of a religious denomination having a bona fide nonprofit, religious organization in the United States;

(ii) seeks to enter the United States--

(I) solely for the purpose of carrying on the vocation of a minister of that religious denomination,

(II) before October 1, 2008, in order to work for the organization at the request of the organization in a professional capacity in a religious vocation or occupation, or

(III) before October 1, 2008, in order to work for the organization (or for a bona fide organization which is affiliated with the religious denomination and is exempt from taxation as an organization described in section 501(c)(3) of the Internal Revenue Code of 1986) at the request of the organization in a religious vocation or occupation; and

(iii) has been carrying on such vocation, professional work, or other work continuously for at least the 2-year period described in clause (i).

We will first address the issue of the petitioner's tax exemption, as this issue presents the most insurmountable obstacle to the approval of the petition.

8 C.F.R. § 204.5(m)(3)(i) requires the petitioner to submit evidence that the organization qualifies as a non-profit organization in the form of either:

(A) Documentation showing that it is exempt from taxation in accordance with section 501(c)(3) of the Internal Revenue Code of 1986 as it relates to religious organizations (in appropriate cases, evidence of the organization's assets and methods of operation and the organization's papers of incorporation under applicable state law may be requested); or

¹ We note that the beneficiary's name appears in different configurations on various documents. On the cover page of this decision, we have stated the beneficiary's name in the order shown on the Form I-360 petition and the beneficiary's passport.

(B) Such documentation as is required by the Internal Revenue Service to establish eligibility for exemption under section 501(c)(3) of the Internal Revenue Code of 1986 as it relates to religious organizations.

The petitioner's initial submission contained no evidence to satisfy the above requirements. The director therefore instructed the petitioner to submit documentation as described in the regulations. The director's notice also requested other evidence.

The petitioner responded to the notice, but the response did not address the tax exemption issue. Pursuant to 8 C.F.R. § 103.2(b)(11), an incomplete response to a request for initial evidence shall be considered to be a request for a decision based on the record.

The director denied the petition, in part because the petitioner offered no evidence that it is exempt from taxation under section 501(c)(3) of the Internal Revenue Code of 1986 (IRC) as it pertains to religious organizations. On appeal, [REDACTED] director of Catholic Charities Office of Pastoral Services, concedes that the petitioner "and [REDACTED] D.D.S.O. are not religious organizations."

The petitioner submits documentation of the group exemption that the Internal Revenue Service granted to the Roman Catholic Church. The church's exemption is uncontested, but irrelevant, as the beneficiary is not employed by the Roman Catholic Church.

8 C.F.R. § 204.5(m)(1) states, in pertinent part:

The alien must be coming to the United States solely for the purpose of carrying on the vocation of a minister of that religious denomination [to which the alien belongs], working for the organization at the organization's request in a professional capacity in a religious vocation or occupation, or working in a religious vocation or occupation for the organization or a bona fide organization which is affiliated with the religious denomination and is exempt from taxation as an organization described in section 501(c)(3) of the Internal Revenue Code of 1986 at the request of the organization.

Pursuant to the above regulation, the employer must be a religious denomination or an organization affiliated with a religious denomination. The regulation at 8 C.F.R. § 204.5(m)(2) contains the following relevant definitions:

Bona fide nonprofit religious organization in the United States means an organization exempt from taxation as described in section 501(c)(3) of the Internal Revenue Code of 1986 as it relates to religious organizations, or one that has never sought such exemption but establishes to the satisfaction of the Service that it would be eligible therefor if it had applied for tax exempt status.

Bona fide organization which is affiliated with the religious denomination means an organization which is closely associated with the religious denomination and which is exempt from taxation as described in section 501(c)(3) of the Internal Revenue Code of 1986 as it relates to religious organizations.

Religious denomination means a religious group or community of believers having some form of ecclesiastical government, a creed or statement of faith, some form of worship, a formal or informal code of doctrine and discipline, religious services and ceremonies, established places of religious worship, religious congregations, or comparable indicia of a bona fide religious denomination. For the purposes of this definition, an inter-denominational religious organization which is exempt from taxation pursuant to section 501(c)(3) of the Internal Revenue Code of 1986 will be treated as a religious denomination.

Secretary of the petitioning entity, states in a letter that the petitioner "is an OMR/DD facility, which is an entity of the State of New York and, therefore, tax-exempt." The petitioner may be tax-exempt, but not every tax-exempt entity qualifies as a tax-exempt religious organization.

The petitioner and prospective employer, in this instance, is not a religious denomination or a bona fide organization which is affiliated with the religious denomination. Rather, the petitioner is a government office that exists primarily for the secular purpose of providing services to individuals with mental disabilities. That the petitioner seeks to employ a chaplain is ancillary to the petitioner's primary purpose. To call a state government office a religious denomination or religious organization would appear to raise very serious Establishment Clause issues, although the AAO lacks authority to rule on constitutional questions.

We acknowledge that the beneficiary is a member of the Roman Catholic Church, which is undoubtedly a religious denomination. Counsel, on appeal, asserts that the "Roman Catholic Church . . . has assigned [the beneficiary] as the official Catholic chaplain of" the petitioner and the Bernard Fineson DDSO. Nevertheless, the beneficiary's employer is not the church, but the petitioner; [redacted] in her initial letter, indicated that the beneficiary "has been employed by the State of New York." The beneficiary's paychecks were issued by the "State of New York / Office of the State Comptroller," and the beneficiary's Form W-2 Wage and Tax Statements identify the employer as "State of New York," further demonstrating that the beneficiary is a state employee, rather than a church employee who has been "assigned" to a government facility.

Because the petitioner is neither a religious denomination nor a bona fide organization affiliated with such a denomination, the petitioner cannot qualify for tax exemption under section 501(c)(3) of the IRC as it applies to religious organizations.

Section 501(c)(3) of the IRC reads, in full:

Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.

The above section does not include government agencies or offices. If the petitioner is exempt from taxation under some other section of law, because of its governmental status, then that exemption does not arise from any religious activity undertaken there, and the petitioner is not exempt under section 501(c)(3) of the IRC.

Even if the petitioner could, hypothetically, qualify for such an exemption, the regulations plainly require the submission of documentation that either recognizes the qualifying exemption, or would suffice to demonstrate eligibility for such recognition. The petitioner has not submitted such documentation, and therefore the director's finding stands.

We note that recent submissions refer to the Roman Catholic Diocese of Brooklyn as the petitioner or at least a co-petitioner. The Form I-360 petition itself does not mention the diocese, nor was it signed by any official thereof. This after-the-fact attempt to amend the petition cannot retroactively remedy any deficiency in the initial petition (*see Matter of Izummi*, 22 I&N Dec. 169 (Comm. 1998)), nor does it change the fact that the beneficiary works at, and collects his salary from, government entities outside of the church.

The next issue concerns the beneficiary's qualifying experience. The regulation at 8 C.F.R. § 204.5(m)(1) indicates that the "religious workers must have been performing the vocation, professional work, or other work continuously (either abroad or in the United States) for at least the two-year period immediately preceding the filing of the petition." 8 C.F.R. § 204.5(m)(3)(ii)(A) requires the petitioner to demonstrate that, immediately prior to the filing of the petition, the alien has the required two years of membership in the denomination and the required two years of experience in the religious vocation, professional religious work, or other religious work. The petition was filed on March 10, 2003. Therefore, the petitioner must establish that the beneficiary was continuously performing the duties of a chaplain throughout the two years immediately prior to that date.

Donna Hendricks asserts that the beneficiary "has been employed by The State of New York since August 24, 2000." The petitioner submits Forms W-2 showing that the State of New York paid the beneficiary \$13,752.29 in 2000, \$49,538.21 in 2001 and \$52,528.05 in 2002. The petitioner also submits pay receipts from the early months of 2003 to establish continued payments to the beneficiary.

There appears to be little reason to doubt that the beneficiary has been performing the duties claimed. Rather, the director's finding regarding qualifying experience appears to relate to the finding that the beneficiary's position is not a qualifying religious occupation or vocation, in which case his experience in that position could not possibly be qualifying experience.

The regulation at 8 C.F.R. § 204.5(m)(2) offers the following pertinent definitions:

Minister means an individual duly authorized by a recognized religious denomination to conduct religious worship and to perform other duties usually performed by authorized members of the clergy of that religion. In all cases, there must be a reasonable connection between the activities performed and the religious calling of the minister. The term does not include a lay preacher not authorized to perform such duties.

Religious occupation means an activity which relates to a traditional religious function. Examples of individuals in religious occupations include, but are not limited to, liturgical workers, religious instructors, religious counselors, cantors, catechists, workers in religious hospitals or religious health care facilities, missionaries, religious translators, or religious broadcasters. This group does not include janitors, maintenance workers, clerks, fund raisers, or persons solely involved in the solicitation of donations.

A copy of a 1995 certificate from the Catholic Diocese of Obuasi, Ghana, affirms the beneficiary's ordination as a Catholic priest. The record also contains copies of several educational diplomas and certificates. In the

face of this evidence, we cannot affirm the director's finding that the petitioner has failed to establish that the beneficiary is qualified for the position offered.

Furthermore, the director appears to have viewed the beneficiary's work through the prism of a religious occupation. The record, however, seems to portray the beneficiary's work as the vocation of a minister. Judith Beer, the petitioner's QA coordinator, indicates that the beneficiary's duties include "Eucharistic services," "sacraments like baptism, confirmation, reconciliation and anointing," and "burials and funerals." The petitioner has repeated this list in subsequent submissions.

The list of the beneficiary's duties appears to be consistent with the duties of a minister, which would make a discussion of the "religious occupation" classification redundant.² That being said, the beneficiary's employer, the petitioner, is a state government facility primarily devoted to providing secular services, rather than a religious organization. Therefore, the beneficiary's employment situation falls outside the statutory and regulatory framework of the classification sought. There is no indication that Congress intended the special immigrant religious worker program to be a means of securing immigration benefits for government employees, or for workers in other predominantly secular institutions that employ chaplains.

A flier in the record, dated March 9, 2003, announces services at Our Lady of Miracles Roman Catholic Church. The flier identifies the beneficiary as being "In Residence" at the church (although another individual is identified as the pastor). This flier does not establish eligibility because the petitioner's primary claim involves the beneficiary's work as a chaplain at two New York DDSOs, rather than at Our Lady of Miracles. The beneficiary's work at the church appears to be an ancillary or "side" activity rather than the beneficiary's principal employment. There is no evidence of any direct connection between the beneficiary's work for the petitioner and his activities at the church.

Pursuant to the above, we find that the beneficiary is engaged in an activity which would amount to qualifying religious work, if such work were performed for a qualifying employer rather than for a non-qualifying state government facility that lacks the necessary 501(c)(3) exemption. The regulations do not extend eligibility to government employees such as chaplains.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.

² This should by no means be interpreted as a blanket finding that every chaplain is engaged in the vocation of a minister. The facts of each case must be considered individually.